Chu Ah Falt v Abdullah bin Abdul Majid

HIGH COURT (MELAKA) — CIVIL APPEAL NO 11-16 OF 1997
AUGUSTINE PAUL JC
27 NOVEMBER 1997

Civil Procedure *— Execution — Writ of possession — Application for leave to issue writ of possession — Order granting leave made pursuant to ex parte application — Whether order granting leave irregular — Whether application for leave should be made inter partes — Whether person in actual occupation had sufficient notice of proceedings for vacant possession against him — Whether service of application for leave on person in actual occupation necessary — Whether service of summons commencing action or order of court obtained on the summons sufficient — Whether reference to absence of any other persons in actual possession in affidavit in support of application for leave necessary — Subordinate Courts Rules 1980 O 30 r 3(3)*

The respondent filed a summons against the appellant claiming for vacant possession of premises and obtained a judgment in default of appearance. A sealed copy of the order was served on the appellant and the respondent subsequently filed an ex parte application praying for an order that he be granted leave to issue a writ of possession against the appellant. The magistrate granted an order in terms of the application on 24 February 1997 ('the order'). A request for the issue of a writ of possession was apparently filed by the respondent on 20 March 1997 and the writ was issued by the court on 2 April 1997 ('the writ'). The appellant filed an application praying for an order, inter alia, that the order be set aside and the writ be struck off; he also applied to be given 28 days to file an application to set aside the judgment in default. The application was dismissed by the magistrate. The appellant appealed.

The appellant contended that the order pursuant to the ex parte application was obtained irregularly as the appellant who was in actual occupation of the premises was not informed of the proceedings. He added that the word 'proceedings' in the phrase '... such notice of the proceedings as appears to the Court sufficient ...' in O 30 r 3(3) of the Subordinate Courts Rules 1980 refers to the application for leave to issue the writ of possession itself thereby necessitating service of the application on the appellant. As such, the application ought to have been made inter partes and not ex parte. The respondent contended that service of the order of court on the appellant was sufficient notice of the proceedings for the purpose of O 30 r 3(3) and, accordingly, the application having been made ex parte was proper. The court also has to consider the sufficiency of the affidavit filed by the respondent in support of his application for leave to issue the writ to justify the order made by the learned magistrate. Counsel for the appellant also submitted that the writ of possession is defective as it was issued out of time contrary to the requirement of O 31 r 2(3).

Held, allowing the appeal:

(1) The language employed in O 30 r 3(3) makes it manifestly patent that receipt of notice of the proceedings by the person in actual possession of the immovable property in question is a prerequisite to be satisfied by an applicant before he can be granted leave. The word 'proceedings' in the phrase '... such notice of the proceedings as appears to the Court sufficient ...' in O 30 r 3(3) gives the court a wide discretion to determine the sufficiency of the notice that is required. There is no restriction in the form of notice that is required but it must be such that it enables the court to be satisfied that it is '... sufficient to enable him to apply to the Court for any relief to which he may be entitled' as prescribed in O 30 r 3(3). Thus, a notice will come within the ambit of the subrule if it has the effect of informing a person of the proceedings for vacant possession against him. The purpose of the notice is to enable a person to apply to court for any relief to which he may be entitled. Therefore, what would constitute sufficient notice for the purpose of this rule would be, inter alia, the service of the summons commencing the action or the order of court obtained on the summons on the person in actual occupation. In an appropriate case, the service of the application for leave to issue the writ of possession itself would also constitute sufficient notice. To that extent, the submission of the appellant that the word 'proceedings' in O 30 r 3(3) refers to only the application for leave to issue the writ cannot be sustained. In the premises, an application for such leave may be made ex parte where the person in actual occupation has had notice of the proceedings by any other sufficient means (see p 455A–F).

(2) The affidavit in support of an application for leave to issue a writ of possession must disclose compliance with O 30 r 3(3) as the subrule dictates in mandatory terms that leave shall not be granted unless it is shown that every person in actual occupation has received notice of the proceedings. Where there are persons in actual possession other than the person against whom judgment has been obtained, then the affidavit must disclose that all of them have received notice of the proceedings. On the other hand, even if there are no other persons in actual possession apart from the person who has obtained the judgment, then there must be an affirmation to that effect in the affidavit. This is to ensure that the court is satisfied that the required prerequisite contained in O 30 r 3(3) has been complied with before granting leave. Without such an affirmation, the court would be merely proceeding on an assumption that there are no other persons in actual possession other than the defendant. This would be wrong in law. In the circumstances, the mere assertion by the respondent in his affidavit that the order of court had been served on the appellant without any reference to the absence of any other persons in actual possession is a violation of O 30 r 3(3). It followed that the magistrate granted leave to issue the writ of possession without being satisfied that there were no other persons

in actual occupation of the premises save for the appellant. The leave granted must therefore be set aside (see pp 455H–I, 456A, I and 457A).

(3) On the face of it, it would appear that the fact that the writ was issued (2 April 1997) beyond the one-month period after the date of the order (24 February 1997) as provided under O 31 r 2(3) was something beyond the respondent's control and he could not be faulted just because the court itself had failed to issue the writ. In such circumstances, the writ filed is deemed to be issued on the date of filing (see p 457D–G); *Kenmoor International Ltd & Anor v DB Trustee (M) Bhd & Anor* [1997] 5 MLJ 421 followed.

However, the original file relating to the matter had disclosed that the request for issue of the writ though dated 20 March 1997 was only filed on 26 March 1997 and issued by the registry on 2 April 1997. It was therefore clear that the documents were filed out of time. The prompt action taken by the registry in dealing with the documents filed by the respondent showed that it could not be faulted for having issued the writ late. Their only fault was in having issued the writ when it had been filed out of time. It ought to have been rejected. But that did not clothe it with any added aura of authority. The fact that the writ was filed out of time meant that the leave granted for its issue had lapsed with the result that the writ was null and void (see pp 458I and 459A–C).

(4) The prayer that the appellant be given 28 days to file an application to set aside the judgment in default was not precise. Order 29 r 14 provides that an application to set aside a judgment must be made within 30 days after the receipt of the order or judgment. On the expiry of this time period, a party may apply for an extension of time to make the application out of time pursuant to O 3 r 5(1). This prayer did not purport to make an application to that effect but merely for a period of 28 days to make the application. This did not accord with the language of O 3 r 5(1). Even if this prayer had been properly framed, the affidavit filed did not disclose sufficient material for the exercise of the discretion in favour of the appellant. Thus the court was unable to consider this prayer (see p 459D–F).

[Bahasa Malaysia summary

Penentang telah memfailkan satu saman terhadap perayu menuntut milikan kosong atas premis dan memperolehi penghakiman ingkar kehadiran. Sesalinan bermeterai perintah telah disampaikan pada perayu dan penentang kemudiannya memfailkan satu permohonan ex parte memohon perintah bahawa dia diberikan kebenaran untuk mengeluarkan satu writ pemilikan terhadap perayu. Majistret memberikan perintah seperti dikehendaki permohonan pada 24 Februari 1997 ('perintah tersebut'). Satu permintaan untuk pengeluaran writ pemilikan kononnya difailkan oleh penentang pada

20 Mac 1997 dan writ dikeluarkan oleh mahkamah pada 2 April 1997 ('writ tersebut'). Perayu memfailkan permohonan memohon perintah, antara lain, bahawa perintah tersebut diketepikan dan writ tersebut dibatalkan; dia juga memohon supaya diberikan 28 hari untuk memfailkan permohonan untuk mengetepikan penghakiman ingkar. Permohonan telah ditolak oleh majistret. Perayu membuat rayuan.

Perayu menghujahkan bahawa perintah tersebut berikutan daripada permohonan ex parte telah diperolehi luar aturan kerana perayu yang berada dalam milikan sebenar premis tidak diberitahu tentang prosiding. Dia bertambah bahawa perkataan 'prosiding' dalam ungkapan '... notis prosiding itu sebagaimana yang didapati mencukupi oleh Mahkamah ...' dalam A 30 k 3(3) Kaedah-Kaedah Mahkamah Rendah 1980 merujuk kepada permohonan untuk kebenaran mengeluarkan writ pemilikan sendiri dengan itu menyebabkan permohonan perlu disampaikan pada perayu. Oleh itu, permohonan sepatutnya telah dibuat inter partes dan bukan ex parte. Penentang menghujahkan bahawa penyampaian perintah mahkamah pada perayu adalah notis yang memadai tentang prosiding untuk tujuan A 30 k 3(3) dan, dengan itu, permohonan yang dibuat ex parte adalah wajar. Mahkamah juga harus mempertimbangkan kecukupan afidavit yang difailkan oleh penentang bagi menyokong permohonannya untuk kebenaran mengeluarkan writ demi memberi justifikasi kepada perintah yang dibuat oleh majistret yang bijaksana. Peguam perayu juga berhujah bahawa writ pemilikan adalah cacat kerana ia dikeluarkan luar masa bertentangan dengan keperluan A 31 k 2(3).

Diputuskan, membenarkan rayuan:

(1) Bahasa yang digunakan dalam A 30 k 3(3) menjadikannya amat nyata bahawa penerimaan notis prosiding oleh orang dalam milikan sebenar harta tak alih berkenaan adalah satu prasyarat yang perlu dipenuhi oleh pemohon sebelum kebenaran boleh diberikan. Perkataan 'prosiding' dalam ungkapan '... notis prosiding itu sebagaimana yang didapati mencukupi oleh Mahkamah ...' dalam A 30 k 3(3) memberikan mahkamah budi bicara yang luas untuk menentukan kecukupan notis yang dikehendaki. Tiada sekatan dalam bentuk notis yang dikehendaki tetapi ia mestilah demikian hinggakan mahkamah puas hati bahawa ia adalah '... mencukupi ... untuk membolehkannya memohon kepada Mahkamah untuk mendapatkan apa-apa relief yang dia mungkin berhak mendapatnya' seperti yang ditetapkan dalam A 30 k 3(3). Justeru itu, suatu notis akan dirangkumi oleh lingkungan subkaedah itu sekiranya ia mempunyai kesan memberitahu seseorang tentang prosiding untuk milikan kosong terhadapnya. Tujuan notis adalah untuk membolehkan seseorang memohon kepada mahkamah untuk apa-apa relief yang dia berhak mendapat. Oleh yang demikian, apa yang membentuk notis yang mencukupi bagi tujuan kaedah ini adalah, antara lain, penyampaian saman yang memulakan tindakan atau perintah

mahkamah yang diperolehi atas saman pada orang dalam milikan sebenar. Dalam kes yang sesuai, penyampaian permohonan untuk kebenaran mengeluarkan writ pemilikan juga membentuk notis yang mencukupi. Setakat itu, hujah perayu bahawa perkataan 'prosiding' dalam A 30 k 3(3) merujuk kepada permohonan untuk kebenaran mengeluarkan writ tersebut sahaja tidak boleh disokong. Oleh yang demikian, sesuatu permohonan untuk kebenaran demikian boleh dibuat ex parte di mana orang dalam milikan sebenar telah mempunyai notis tentang prosiding melalui mana-mana cara lain yang mencukupi (lihat ms 455A–F).

(2) Afidavit menyokong permohonan untuk kebenaran mengeluarkan writ pemilikan mestilah mendedahkan pematuhan dengan A 30 k 3(3) kerana subkaedah ini menetapkan dalam terma mandatori bahawa kebenaran tidak harus diberikan melainkan ditunjukkan bahawa setiap orang dalam milikan sebenar telah menerima notis prosiding. Di mana terdapat orang dalam milikan sebenar selain daripada orang terhadap siapa penghakiman telah diperolehi, maka afidavit mesti mendedahkan bahawa kesemua mereka telah menerima notis tentang prosiding. Sebaliknya, sekalipun tiada sesiapa dalam milikan sebenar selain daripada orang yang telah memperolehi penghakiman, maka mesti terdapat pengesahan atasnya dalam afidavit. Ini adalah untuk memastikan bahawa mahkamah berpuas hati bahawa prasyarat yang dikehendaki yang termaktub dalam A 30 k 3(3) telah dipatuhi sebelum kebenaran diberikan. Tanpa pengesahan begitu, mahkamah cuma meneruskan dengan anggapan bahawa tiada sesiapa lagi dalam milikan kosong selain daripada defendan. Ini adalah salah di sisi undang-undang. Dalam keadaan ini, kenyataan semata-mata oleh penentang dalam afidavitnya bahawa perintah mahkamah telah disampaikan pada perayu tanpa sebarang rujukan kepada ketidakhadiran mana-mana orang lain dalam milikan sebenar merupakan satu pelanggaran A 30 k 3(3). Ini bermakna bahawa majistret telah memberikan kebenaran untuk mengeluarkan writ pemilikan tanpa berpuas hati bahawa tiada sesiapa lagi dalam milikan sebenar premis kecuali perayu. Dengan itu, kebenaran yang diberikan mestilah diketepikan (lihat ms 455H–I, 456A, I dan 457A).

(3) Pada zahirnya, ia kelihatan bahawa hakikat bahawa writ tersebut dikeluarkan (2 April 1997) melampaui tempoh sebulan selepas tarikh perintah tersebut (24 Februari 1997) seperti yang diperuntukkan di bawah A 31 k 2(3) adalah sesuatu di luar kawalan penentang dan dia tidak boleh dipersalahkan hanya kerana mahkamah sendiri telah gagal mengeluarkan writ tersebut. Dalam keadaan ini, writ tersebut yang difailkan dianggap dikeluarkan pada tarikh pemfailan (lihat ms 457D–G); *Kenmoor International Ltd & Anor v DB Trustee (M) Bhd & Anor* [1997] 5 MLJ 421 diikut.

Namun demikian, fail asal berhubung dengan perkara ini mendedahkan bahawa permintaan untuk pengeluaran writ

tersebut meskipun bertarikh 20 Mac 1997 hanya difailkan pada 26 Mac 1997 dan dikeluarkan oleh pejabat pendaftar pada 2 April 1997. Maka adalah jelas bahawa dokumen-dokumen difailkan di luar masa. Tindakan segera yang diambil pejabat pendaftar dalam menguruskan dokumen-dokumen yang difailkan oleh penentang menunjukkan bahawa ia tidak boleh dipersalahkan kerana lewat dalam mengeluarkan writ tersebut. Satu-satunya kesalahan mereka adalah mengeluarkan writ tersebut walhal ia telah difailkan di luar masa. Ia sepatutnya telah ditolak. Akan tetapi itu tidak melitupinya dengan apa-apa kuasa tambahan. Hakikat bahawa writ tersebut difailkan di luar masa bermakna bahawa kebenaran yang diberikan untuk pengeluarannya telah luput dengan keputusan bahawa writ tersebut adalah tak sah dan terbatal (lihat ms 458I dan 459A–C).

(4) Tuntutan bahawa perayu diberikan 28 hari untuk memfailkan satu permohonan bagi mengetepikan penghakiman ingkar tidak tepat. Aturan 29 k 14 memperuntukkan bahawa sesuatu permohonan untuk mengetepikan penghakiman mesti dibuat dalam tempoh 30 hari selepas penerimaan perintah atau penghakiman. Apabila tamatnya jangkamasa ini, sesuatu pihak boleh memohon perlanjutan masa bagi membuat permohonan luar masa menurut A 3 k 5(1). Tuntutan ini tidak bertujuan membuat permohonan demikian tetapi cuma untuk tempoh 28 hari bagi membuat permohonan. Ini tidak mematuhi bahasa A 3 k 5(1). Sekalipun permohonan ini telah dibuat dengan sewajarnya, afidavit yang difailkan tidak mendedahkan material yang mencukupi untuk pelaksanaan budi bicara memihak kepada perayu. Maka mahkamah tidak dapat mempertimbangkan tuntutan ini (lihat ms 459D–F).]

Notes

For cases on writ of possession, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1389–1392.

Cases referred to

Kenmoor International Ltd & Anor v DB Trustee (M) Bhd & Anor [1997] 5 MLJ 421 (followed)

Leong Ah Weng v Neoh Thean Soo & Anor [1983] 2 MLJ 119 (refd)

Manchester Corp v Connolly & Ors [1970] 1 All ER 961 (refd)

Perdana Properties Bhd v Yong Chon [1990] 1 MLJ 433 (refd)

Legislation referred to

Rules of the High Court 1980 O 59 r 3(2)

Subordinate Courts Rules 1980 O 3 r 5(1), O 29 r 14, O 30 rr 3, 5, 6, 7, O 31 r 2(3), O 49 r 6

Wong Nai Chee (*SK Khoo & Tan Tian Tiok*) for the appellant.
Tiu Leong Kim (*Koh Kim Leng & Co*) for the respondent.

Augustine Paul JC: The substantial matter for consideration in making a determination in this appeal is the law governing leave to issue a writ of possession of immovable property pursuant to O 30 r 3 of the Subordinate Courts Rules 1980 ('the SCR'). All references in this judgment hereafter to rules of court shall be to the SCR unless otherwise stated.

On 9 July 1996, the plaintiff ('the respondent') filed a summons and statement of claim in the Magistrate's Court, Melaka against the defendant ('the appellant') claiming for, inter alia, vacant possession of premises No 167-1, Jalan Pokok Mangga, Balai Panjang, Melaka ('the premises') and mesne profits. On 7 October 1996, the respondent obtained judgment in default of appearance against the appellant. The material parts of the order of court in respect of the judgment read as follows:

> Tindakan itu setelah dipanggil pada hari ini untuk sebutan di hadapan Tuan Azman bin Ahmad, Majistret, Mahkamah Majistret Melaka dalam kehadiran En Tiu Leong Kim, peguamcara bagi pihak plaintif dan defendan tidak hadir walaupun telah diserahkan dengan saman dan pernyataan tuntutan.
>
> Maka dengan ingkar pada hari ini dihakimi bahawa defendan hendaklah:
>
> (1) mengembalikan milikan kosong tanah tersebut kepada plaintif dalam masa dua (2) minggu dari tarikh perintah wajib dikeluarkan. Dalam keingkaran mematuhi perintah tersebut oleh defendan, plaintif dibenarkan masuk ke premis dan tanah tersebut untuk mengambil alih milikan dan jika perlu, dibenarkan menggunakan kekerasan yang munasabah untuk maksud tersebut;
>
> (2) mesne profit atau hasil perantaraan dengan kadar RM200 sebulan dikira dari 10 September 1994 sehingga milikan premis dan tanah tersebut diperolehi oleh plaintif;
>
> (3) faedah pada kadar 8% mulai dari tarikh penghakiman sehingga tarikh penyelesaian; dan
>
> (4) kos RM252.

A sealed copy of the order was served on the appellant by way of AR Registered Post on 11 December 1996. Subsequently, the respondent, by an ex parte application filed on 27 January 1997, prayed for an order, inter alia, that:

> (a) he be granted leave to issue a writ of possession against the defendant in respect of the order of court dated 7 October 1996; and
>
> (b) that the defendant do pay mesne profits at the rate of RM200 per month from 10 September 1994 till delivery of vacant possession.

The material parts of the affidavit in support of the application affirmed by Tiu Leong Kim, advocate and solicitor, read as follows:

> (1) Saya adalah seorang peguamcara dan peguambela yang menjalankan amalan di Tetuan Koh Kim Leng & Co yang beralamat di No 5-1, Lorong Hang Jebat, 75200 Melaka.
>
> (2) Saya adalah peguam yang mengendailkan kes ini dan telah diberikuasa untuk mendeposkan afidavit ini.

A (3) Segala yang dideposkan di sini adalah benar melalui maklumat dan fail yang saya mempunyai akses.

(4) Izinkan saya merujuk kepada afidavit penyampaian yang diikarkan oleh Cheong Kim Wah pada 20 Januari 1997 yang telah difailkan di Mahkamah yang mulia ini.

B (5) Sesalinan meterai penghakiman bertarikh 7 Oktober 1996 telah disampaikan kepada defendan dengan pos AR Berdaftar pada 11 Disember 1996.

(6) Sehingga hari ini, defendan masih enggan, ingkar dan gagal untuk mematuhi penghakiman tersebut untuk mengembalikan milikan kosong tanah tersebut kepada plaintif dan juga enggan dan gagal membayar C apa-apa 'mesne profit' atau hasil perantaraan.

(7) Oleh yang demikian, saya dengan rendah dirinya memohon suatu perintah seperti dipohon dan writ pemilikan dikeluarkan oleh mahkamah yang mulia ini.

On 24 February 1997, the learned magistrate granted an order in terms of D the application. The material parts of the order read as follows:

> Atas permohonan plaintif melalui notis permohonan bertarikh 25 Januari 1997 (kand 7) dan setelah mendengar En Tiu Leong Kim peguamcara bagi pihak plaintif dan setelah membaca notis permohonan tersebut serta afidavit Tiu Leong Kim (kand 6) yang diikrarkan pada 20 Januari 1997 dan semuanya difailkan di sini dan setelah mendengar peguam tersebut maka adalah E dengan ini diperintahkan bahawa:
>
> (1) plaintif adalah dibenarkan untuk mengeluarkan pelaksanaan writ pemilikan terhadap defendan atas penghakiman di dalam ini bertarikh 7 Oktober 1996;
>
> (2) defendan hendaklah membayar 'mesne profit' atau hasil perantaraan F dengan kadar RM200 sebulan dikira dari 10 September 1994 sehingga milikan tanah tersebut kepada plaintif; dan
>
> (3) bahawa defendan hendaklah membayar kos permohonan dan kos pelaksanaan.

Accordingly, on 20 March 1997, as claimed by learned counsel for the G respondent, he filed a request for the issue of a writ of possession. The writ was issued by the court on 2 April 1997 and execution was carried out on 14 April 1997. On 24 April 1997, the appellant filed an application praying for an order, inter alia, that:

(a) the order of court dated 24 February 1997 be set aside;

H (b) the writ of possession issued on 2 April 1997 be struck off;

(c) he be given 28 days to file an application to set aside the judgment in default entered on 7 October 1996; and

(d) all proceedings be stayed pending the hearing of the application to set aside the judgment.

I The application was supported by an affidavit to which a reply was filed by the respondent. On 6 August 1997, the application was dismissed with costs by the learned magistrate. The parties are now before me by way of an appeal against that order. The appeal was filed on 20 August 1997 pursuant to O 49 r 6.

I shall now consider the issues arising for determination against the background of the arguments advanced by both counsel.

(a) Order granting leave to issue the writ of possession

The law relating to the issue of a writ of possession is governed by O 30 r 3 which reads as follows:

> 3 (1) Subject to the provisions of these rules, a judgment or order for the giving of possession of immovable property may be enforced by one or more of the following means that is to say —
> (a) writ of possession;
> (b) in a case in which rule 5 applies, an order of committal.
>
> (2) A writ of possession to enforce a judgment or order for the giving of possession of any immovable property shall not be issued without the leave of the Court.
>
> (3) Such leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the immovable property has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled.
>
> (4) A writ of possession may include provision for enforcing the payment of any money adjudged or ordered to be paid by the judgment or order which is to be enforced by the writ.

Before I embark on a consideration of the arguments advanced before me by learned counsel, it is perhaps necessary to make some preliminary observations on the scope of O 30 r 3. The rule stipulates that leave to issue a writ of possession must first be obtained in all cases. However, leave will only be given to enforce a final judgment or order for possession (see *Manchester Corp v Connolly & Ors* [1970] 1 All ER 961; *Leong Ah Weng v Neoh Thean Soo & Anor* [1983] 2 MLJ 119). The rule provides two methods of enforcing an order which gives possession of immovable property, that is to say, by a writ of possession and an order of committal. Enforcement of a judgment by an order of committal is dependent on certain conditions being satisfied as specified in O 30 rr 5, 6 and 7. This judgment does not warrant a detailed consideration of those rules.

In his submission, learned counsel for the appellant contended that the order granting leave to issue the writ of possession pursuant to the ex parte application was obtained irregularly as the appellant who was in actual occupation of the premises was not informed of the proceedings. He added that the word 'proceedings' in the phrase '... such notice of the proceedings as appears to the Court sufficient ...' in O 30 r 3(3) refers to the application for leave to issue the writ of possession itself thereby necessitating service of the application on the appellant. As such, he concluded, the application ought to have been made inter partes and not ex parte with the result that it is irregular. In his reply, learned counsel for the respondent contended that service of the order of court on the appellant is sufficient notice of the proceedings for the purpose of O 30 r 3(3) and, accordingly, the application having been made ex parte is proper based on *Perdana Properties Bhd v Yong Chon* [1990] 1 MLJ 433. Thus, the crux of

A the contention of both parties centers on the type of notice that the appellant must have had in order to warrant leave being granted to the respondent to issue the writ of possession. The language employed in O 30 r 3(3) makes it manifestly patent that receipt of notice of the proceedings by the person in actual possession of the immovable property in question is a prerequisite to be satisfied by an applicant before he can be granted B leave. In my opinion, the word 'proceedings' in the phrase '... such notice of the proceedings as appears to the court sufficient ...' in O 30 r 3(3) gives the court a wide discretion to determine the sufficiency of the notice that is required. There is no restriction in the form of notice that is required but it must be such that it enables the court to be satisfied that it is '... C sufficient to enable him to apply to the Court for any relief to which he may be entitled' as prescribed in O 30 r 3(3). Thus, a notice will come within the ambit of the subrule if it has the effect of informing a person of the proceedings for vacant possession against him. The purpose of the notice is to enable a person to apply to court for any relief to which he may be entitled. To my mind, therefore, what would constitute sufficient D notice for the purpose of this rule would be, inter alia, the service of the summons commencing the action or the order of court obtained on the summons on the person in actual occupation. In an appropriate case, the service of the application for leave to issue the writ of possession itself would also constitute sufficient notice. To that extent, the submission of E learned counsel for the appellant that the word 'proceedings' in O 30 r 3(3) refers to only the application for leave to issue the writ cannot be sustained. In the premises, an application for such leave may be made ex parte where the person in actual occupation has had notice of the proceedings by any other sufficient means. In this regard, I refer to *The Supreme Court Practice* (1985) where it is stated at p 663:

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> In the Queen's Bench Division, the application for leave to issue the writ of possession is made ex parte to the Practice Master upon affidavit, which must comply with the requirement of para (3).

Having intimated my views to both parties, I invited them to consider the G sufficiency of the affidavit filed by the respondent in support of his application for leave to issue the writ to justify the order made by the learned magistrate. There was no positive response from either of them. The passage from *The Supreme Court Practice* (1985) which I have just reproduced states that the affidavit must comply with the requirement of para (3) which is similar to O 30 r 3(3). I fully agree that the affidavit must H disclose compliance with O 30 r 3(3) as the subrule dictates in mandatory terms that leave shall not be granted unless it is shown that every person in actual occupation has received notice of the proceedings. Where there are persons in actual possession other than the person against whom judgment has been obtained, then the affidavit must disclose that all of them have received notice of the proceedings. On the other hand, even if I there are no other persons in actual possession apart from the person who has obtained the judgment, then there must be an affirmation to that effect in the affidavit. This is to ensure that the court is satisfied that the required prerequisite contained in O 30 r 3(3) has been complied with before

granting leave. I reproduce below the form of affidavit in support that must be filed in an application for leave to issue a writ of possession from *The Supreme Court Practice* (1985) Vol II PF No 94:

I, (name, address and description of *deponent*) make oath and say as follows:

1 The writ of summons in this action was on the ... day of ... duly served upon the defendant.

2 No notice of intention to defend having been given judgment (*or as the case may be*) was signed on the ... day of ... for possession of (*describe the property*).

3 On the ... day of ... I sent by prepaid post to the defendant (and land) a letter setting out the particulars of the said judgment and asking him (*or them*) to vacate the said premises forthwith (*summarize the contents of the letter*) and stating that in default of vacating the said premises or of any application by him (them) to the Court for relief or otherwise my client would proceed to recover possession upon the said judgment without further notice.

4 On the ... day of ... I received from (the defendant and) AB and CD the letter(s) which is/are annexed hereto and marked.

5 No part of the premises actually occupied is a dwelling-house *or*,

The part of the premises in actual possession of AB is a dwelling-house and the rateable value is £ ____.

6 (*If any part of the premise actually occupied is a dwelling-house, here state any other facts which will assist the Master in determing whether any occupation is protected by the Rent Acts*).

7 I am informed and according to the best of my knowledge and information verily believe (*state source of information and grounds for belief*) that save for the defendant (and) his family and the above-named persons served with notice of these proceedings there is no other person who is in actual possession of the whole or any part of the said premises. I submit that the defendant (has) (and the above-named persons have) received sufficient notice of these proceedings to enable him (them) to apply to the Court for relief and since the date of the judgment he has (they have) had time so to do and on behalf of the plaintiff I crave leave to issue forthwith a writ of possession of the said premises (and for payment of the amount) in the judgment in this action mentioned.

Sworn, etc.

This affidavit is filed on behalf of the

Note — The above form makes no mention of costs. Should a plaintiff desire that costs be awarded, an appropriate paragraph to that effect should be added to the affidavit. The form should be modified to suit the circumstances of each particular case.

Paragraph 7 contains an affirmation on the absence of other persons in actual occupation when there are no such persons save for the defendant and his family. Without such an affirmation, the court would be merely proceeding on an assumption that there are no other persons in actual possession other than the defendant. This, to my mind, would be wrong in law. In the circumstances, the mere assertion by the respondent in his affidavit that the order of court has been served on the appellant without

A any reference to the absence of any other persons in actual possession is a violation of O 30 r 3(3). It follows that the learned magistrate granted leave to issue the writ of possession without being satisfied that there were no other persons in actual occupation of the premises save for the appellant. The leave granted must therefore be set aside.

B *(b) The validity of the writ of possession issued on 2 April 1997*

My ruling on the leave granted by the learned magistrate suffices to render all other steps taken by the respondent defective. Be that as it may, I consider it necessary to refer to the submission of learned counsel for the appellant that the writ of possession is defective as it was issued out of time C contrary to the requirement of O 31 r 2(3) which reads as follows:

> Where the Court grants leave, whether under this rule or otherwise, for the issue of a writ of execution and the writ is not issued within one month after the date of the order granting such leave, the order shall cease to have effect, without prejudice, however, to the making of a fresh order.

D As leave was granted to the respondent to issue the writ of possession on 24 February 1997, he ought to have issued the writ by 23 March 1997. However, the writ was issued only on 2 April 1997. This, contended learned counsel for the appellant, is fatal as the writ was not issued within the one-month period after leave to issue the writ was granted. In explaining E the delay, learned counsel for the respondent contended that he is not to be faulted for the delay as the writ which was filed in court within time on 20 March 1997 was issued by the court only on 2 April 1997. In support of his argument, he referred to *Kenmoor International Ltd & Anor v DB Trustee (M) Bhd & Anor* [1997] 5 MLJ 421, where it was held that the fact F that a notice was issued or extracted by a party beyond the five-day period within which it must have been done was something beyond his control and he could not be faulted just because the court itself had failed to issue the notice of appeal to him within the prescribed time. In ruling that in such circumstances the document filed is deemed to be issued, Haidar J (as he then was) said at pp 423–424:

G

> According to the counsel for the plaintiffs, though the notice of appeal was filed within the five-day period as prescribed, it was only issued on 6 March 1977 to the first defendant thereby contravening O 56 r 1(3).
>
> *The Malaysian Court Practice Rules of the High Court 1980* (1996, Malayan Law Journal Sdn Bhd) at p 72, in dealing with O 6 r 2(1) of the RHC H (substantially in pari materia with RSC O 6 r 2) states:
>
> > 'A writ is effective only when issued and a *writ is deemed issued when it is sealed.* A plaintiff who lodges the correct papers for the institution of the suit and pays the proper fees on a particular date should have as a matter of necessary implication, the writ sealed on or as of, the date.' (Emphasis added.)

I Two cases namely, *Jumatsah bin Daud & Anor v Voon Kin Kuet & Anor* [1981] 1 MLJ 254 and *Kok Song Kong v BSP Co Sdn Bhd* [1988] 2 MLJ 440 were cited in support thereof.
>
> The word 'sealed' is not defined in the RHC and neither is the word 'issued'.

In *Jumatsah bin Daud & Anor v Vook Kin Kuet & Anor,* a Kuching High Court case, the learned judge citing with approval the case of *Boota Singh v Isman bin Ali* [1957] MLJ 127, agreed that when a writ is sealed, it is deemed to be issued.

Jumatsah's case was quoted with approval by the Brunei Court of Appeal in *Kok Song Kong v BSP Co Sdn Bhd.* At p 441, the Court of Appeal stated:

> 'The plaintiff lodged the correct papers for the institution of the suit, and paid the proper fees, on 18 April 1984, and accordingly the writ should have been sealed on, or as of, that date. There is no express provision to that effect in the rules, but it is , in our judgment, a matter of necessary implication. As this case shows, the date on which a suit is instituted may be crucial to the rights of the parties. *To have those rights depend on the whim of a court functionary cannot be right. Such a thing cannot be allowed as an admissible feature of a civilized system of jurisprudence.*' (Emphasis added.)

Later on in the same page of the judgment, the Court of Appeal cited *Aly v Aly* (1984) 128 Sol J 64 with approval the observation of Eveleigh LJ thus:

> 'Eveleigh LJ observed that it did not make sense that a party who had done everything required of him by the rules should be penalized for something not done in time by the court. It would be surprising and harsh, he said, if a litigant who had done all that was required of him should be unable to obtain the court's assistance because the court itself had failed in some matter of procedure.'

By analogy, therefore, once the notice of appeal in this case has been filed within the time prescribed and duly signed and sealed within the time frame, then the notice of appeal is deemed to have been issued. It follows therefore, on the undisputed facts, that the first defendant has duly complied with O 56 r 1(3) of the RHC, that is, the notice of appeal was issued, that is signed, sealed and dated on 3 February 1997 (within the five-day period). The fact that the notice was 'issued' or extracted by the first defendant beyond the five-day period was something beyond the control of the first defendant, and in my view, the first defendant could not be faulted just because the court itself had failed to 'issue' the notice of appeal to the first defendant within the time prescribed. To use the words of the Court of Appeal in *Kok Song Kong's* case, 'to have those rights depend on the whim of a court functionary cannot be right. Such a thing cannot be allowed as an admissible feature of a civilized system of jurisprudence'.

I am in full agreement with the sagacious views expressed by Haidar J. Learned counsel for the appellant did not proceed any further with this issue.

However, before I could deem the writ to have been regularly issued by the registry, I thought it wise to have a look at the original file relating to the matter from the magistrate's court registry to ascertain the cause for the delay in the issue of the writ. I called for the file and what I discovered astounded me. The draft order of court granting leave to issue the writ was filed in court on 4 March 1997. It was returned to counsel, after having been duly approved, on 5 March 1997. The fair copies of the order, received by the registry on 13 March 1997, were returned to counsel on 18 March 1997. The request for issue of the writ and the writ, contrary to the assertion of learned counsel for the respondent, though dated 20 March

A 1997 was only filed on 26 March 1997 and issued by the registry on 2 April 1997. It is therefore clear that the documents were filed out of time. When I queried learned counsel for the respondent on the dates furnished by him, he apologized profusely and said that he had been misinformed by his clerk as to the correct date of filing. I accepted his
B explanation. The prompt action taken by the registry in dealing with the documents filed by the respondent shows that it cannot be faulted for having issued the writ late. In fact, the registry staff have worked with commendable speed and must be complimented for their remarkable efficiency. Their only fault is in having issued the writ when it had been filed out of time. It ought to have been rejected. But that does not clothe
C it with any added aura of authority. The fact that the writ was filed out of time means that the leave granted for its issue has lapsed with the result that the writ is null and void.

(c) Order for 28 days to be given to file an application to set aside the judgment in default entered on 7 October 1996

D

This prayer is not precise. Order 29 r 14 provides that an application to set aside a judgment must be made within 30 days after the receipt of the order or judgment. On the expiry of this time period, a party may apply for an extension of time to make the application out of time pursuant to O 3 r 5(1). This prayer does not purport to make an application to that effect
E but merely for a period of 28 days to make the application. This does not accord with the language of O 3 r 5(1). Even if this prayer had been properly framed, the affidavit filed does not disclose sufficient material for the exercise of the discretion in favour of the appellant. Thus I am unable to consider this prayer.

F

(d) Order for all proceedings to be stayed pending the hearing to set aside the judgment

In the light of my ruling on prayer (c), this prayer does not arise for consideration.

G

In the upshot, I allow the appeal with costs. However, I make no order as to costs on getting up for obvious reasons in accordance with O 59 r 3(2) of the Rules of the High Court 1980.

Appeal allowed.

H

Reported by Jafisah Jaafar

I